

DECISION  
TALBOT COUNTY BOARD OF APPEALS  
Appeal No. 15-1642

Pursuant to due notice, a public hearing was held by the Talbot County Board of Appeals (the Board) at the Bradley Meeting Room, Court House, South Wing, 11 North Washington Street, Easton, Maryland, beginning at 7:00 p.m., February 29, 2016 on the Application of **CLAYTON** and **PATRICIA FISHER** (the Applicants). The Applicants are seeking a variance to exceed the fifteen percent (15%) lot coverage threshold by approximately one thousand sixty-six (1,066) sq. ft. The proposed additions would result in a total lot coverage of fourteen thousand four hundred eighty eight (14,488) sq. ft. creating sixteen point two percent (16.2%) lot coverage. The proposed new lot coverage includes an eight hundred thirty two (832) sq. ft. detached garage and approximately one thousand seven hundred eighty-four (1,784) sq. ft. of additional driveway and walking paths. The request is made in accordance with Chapter 190, Zoning, Article VI, §190-136 and Article IX, §190-182 of *Talbot County Code* (the *Code*). The property contains two and forty eight one thousandths (2.048) acres and is located at 5920 Oxford Road, Oxford, MD 21654 in the Rural Residential (RR) zone. The property owners are Clayton and Patricia Fisher, and the property is shown on Tax Map 48, Grid 3, Parcel 11, tax assessment account identifier 03-113981.

Present at the hearing for the Board of Appeals were: Paul Shortall, Jr., Chairman; Phillip Jones, Vice Chairman; members Margaret Young, John Sewell, and Louis Dorsey, Jr. Anne C. Ogletree served as attorney for the Board of Appeals. Jeremy Rothwell, Planner I, was in attendance.

The Chairman inquired if all members had visited the site and received affirmative responses.

The following exhibits were offered and admitted into evidence as indicated:

- Exhibit 1. Application for Critical Area Variance and attachment A;
- Exhibit 2. Copy of tax map with subject property highlighted in yellow;
- Exhibit 3. Revised notice of Public Hearing published in the Star Democrat;
- Exhibit 4. Newspaper Confirmation;
- Exhibit 5. Revised notice of Public Hearing & Adjacent Property Owners List;

Exhibit 6. Critical Areas Standards with attachment B;  
Exhibit 7. Staff Report prepared by Jeremy Rothwell on 1/28/16 with attachments;  
Exhibit 8. Sign Maintenance Agreement;  
Exhibit 9. Site Plan prepared by Lane Engineering, LLC;  
Exhibit 10. Elevation drawings prepared by Christine Dayton, Architect;  
Exhibit 11. Floor plan;  
Exhibit 12. Letter from Critical Area Commission dated 2/16/16 by Jennifer Anderson;  
Exhibit 13. Independent Procedures Disclosure and Acknowledgment Form;  
Exhibit 14. Aerial Photo;  
Exhibit 15. Critical Area Lot Coverage Computation worksheets;  
Exhibit 16. Photos by Chris Corkell from site visit 1/14/16

The Chairman also admitted the following exhibits during the hearing:

Applicant's Exhibit 1. Letter from W. Thomas Fountain;  
Applicant's Exhibit 2. Letter from Phyllis McGinn.

The Chairman inquired if all members had visited the site and received an affirmative response. He then requested that those who might wish to testify rise and be sworn. All witnesses were sworn.

Mr. Bill Stagg, Lane Engineering, LLC, 117 Bay Street, Easton, MD 21601 introduced himself. He advised the Board that he was assisting the Applicants with the application. He explained that the Applicants' lot, located at 5920 Oxford Road, on the Oxford side of Peachblossom Creek, is just two (2) acres in size. The entire lot is within the critical area and is already improved with a residence, pool, brick walkways, a brick driveway, mature trees and a storage shed. He explained that he believed the lot to be unique in that it is severely constrained by a one hundred fifty foot (150') setback from the Oxford Road (Md. Rt. 333), fifty foot (50') building restriction lines on each side and the one hundred foot (100') shoreline development buffer on the north and west. There is a relatively small building envelope. *See*, exhibit 9, site plan. The Applicants would like to build a garage, as they believe it is the only thing the property lacks. The Applicants are required to place the garage as shown on the site plan due to the setback constraints.

To save as many of the existing mature trees as possible, the Applicants wish to create a curved mulched driveway to the garage entrance – which, unfortunately, will count as lot coverage and will require a variance. The Applicants have considered pervious pavers, but they, too, would be considered lot coverage under the current

regulations.

The lot coverage calculations show that eleven thousand eight hundred thirty two (11,832) sq. ft. of impervious coverage is currently on site. That allowed is thirteen thousand three hundred eighty two (13,382) sq. ft., a difference of fifteen hundred fifty (1,550) sq. ft. The proposal, as shown on exhibit 9, will result in fourteen thousand four hundred eighty-eight (14,488) sq. ft. of lot coverage. Mr. Stagg felt that the goal of preserving the existing mature trees on such a confined building area created a hardship and justified the variance. He noted that garages are a normal accessory structure for a residence and would be an expected amenity for a home in this location and price range.

Both Mr. Stagg and the Applicants were aware that the Critical Area Commission (CAC) is opposed the grant of a variance and does not consider the lack of a garage an unwarranted hardship. Mr. Stagg stressed that there was no other location for the proposed structure and the driveway extension without destroying existing mature trees. He noted that there was really no adequate storage for vehicles and equipment on site, and that the required three to one (3:1) mitigation required for the additional lot coverage area would enhance water quality. He referred the Board to applicants' exhibits 1 and 2, letters from neighbors supporting the project.

Mr. Clayton Fisher was the next witness. He explained that he and his wife had just turned seventy (70). They had spent some time looking for a suitable retirement home. They purchased the property about eighteen months ago, and were delighted by the views, the land and mature trees growing on the property. He noted that a mature oak in the back of the residence had a girth of twenty-two feet (22') and a large loblolly pine in the front yard was twelve feet (12') in circumference.

He explained that the only negative to the property was the lack of a garage. He and his wife hired Lane Engineering to assist them with finding a location on the property for a garage and to assist them in devising a design that would avoid the necessity of having to cut any of the large trees. After considerable thought, the Applicants submitted the design shown on the site plan and were advised it could not be approved.

In conversations with their architect and Mr. Stagg, they inquired as to what could be done to get the project approved. They were advised that they could move the garage closer to the existing driveway, and create a straight entrance. That solution would

require taking out the large pine tree. In hopes of saving the tree, the Fishers met with Lane Engineering to consider alternatives.

Mr. Stagg noted that the proposal the Applicants have submitted saves all trees and would not adversely impact water quality. The project is exempt from storm water management requirements as there is little disturbance. Although not required to do so, the Applicants plan to use pervious pavers with a stone basin to allow run off to be absorbed by the soil. The soil on site is adequate for such an installation.

Mr. Jones asked about soil type. Mr. Stagg responded that the predominant soil was loamy sand, moderate to well-drained. The property is well vegetated and had numerous roots available to absorb water. He noted that there would be sufficient room for any required mitigation.

Mr. Rothwell commented that although staff appreciated the Applicants' desires to use pervious pavers to enhance water quality, he noted that site improvements created with the pavers have to be maintained in order to function properly. Mr. Stagg suggested that should the Board decide to allow the Applicant use pavers rather than reduce lot coverage, the Board might wish to consider some sort of easement to allow inspection by the Department of Public Works to ascertain that the surface created by the pavers was functioning as designed.

Mr. Jones commented that he was curious if the Board even had the authority to vary the requirement for the maximum of fifteen percent (15%) lot coverage standard. He inquired if Mr. Stagg had any insight on the CAC's intent and the reason for the coverage limitation.

Mr. Stagg understood that the percentage limitation was the threshold amount of lot coverage a property could support without having an adverse effect on water quality.

Mr. Rothwell commented that he understood that the fifteen percent (15%) was a figure arrived at by negotiation – the result of listening to experts and choosing a figure everyone could agree on. It is not site specific. However, he believed the variance procedure was better suited to the very small lots in old subdivisions in the Limited Development Areas (LDAs) like Tilghman, for example.

Mr. Jones questioned if this lot is one where a variance should be considered commenting that there are any number of other critical area lots that are smaller and have

similar constraints. Would each of those also be entitled to a variance?

Ms. Ogletree stated that variances are ordinarily granted for matters concerning lot or structure area, *i.e.* yard requirements, setbacks and the like. Lot coverage is an area requirement. She felt the Board had the authority to grant a variance provided all of the *Code* requirements were met.

Mr. Rothwell stated that while he agrees with the Applicants that the location chosen by the Applicants is the most suitable if a garage is to be allowed, the Board must determine is whether the lack of a garage is an unwarranted hardship that can **only** be alleviated by the grant of a variance.

Ms. Young suggested that the Applicant might wish to remove some of the existing impervious surface as a way to reduce the total lot coverage. For instance, the shed could easily be removed. Some of the brick parking area or walkways also could be easily removed. The Applicants could reduce the existing lot coverage if they wished to implement their proposed design.

Mr. Sewell concurred, noting that the area shaded in green on the attachment to the staff report, exhibit 9, if removed would reduce the size of the requested variance by approximately seven hundred twenty five (725) square feet.

Ms. Young suggested that the construction of the garage might eliminate the need for the shed. Removing the shed would reduce the request by two hundred ninety one (291) sq. ft. Mr. Sewell commented that if the Applicant agreed to remove existing surfaces the lot coverage numbers would have to be adjusted.

Mr. Rothwell posited that the suggested impervious surface removals would reduce the requested variance from approximately one thousand (1,000) square feet to three hundred (300) square feet -- a substantial reduction.

The Chairman asked if any consideration had been given to reducing the size of the garage noting that while a larger garage would be easier to access, and provide more storage, a smaller one would help with the lot coverage issues.

Ms. Patricia Fisher, one of the Applicants, explained that she is a professional artist, and was hesitant to agree to remove the shed, as it contained painting supplies and framing materials that she used regularly as well as other things. When asked if those items could be stored in the new garage she responded in the negative, adding that

removing them from the shed would be a substantial inconvenience.

Mr. Shortall explained that the Board members were trying to find a way to cut down on lot coverage, and the smaller the request to exceed the lot coverage requirement, the more likely it might be approved.

Mr. Fisher felt it important to point out that the Applicant was going to be able to build a garage on the site, and had obtained a permit to do so. Unfortunately, if the Applicants were to proceed with the construction as permitted, it would mean that they would have to take the large pine out, and they were reluctant to do so without exhausting all their options. He does not want to diminish the value of his property by tearing up the hardscapes that are in place. He noted that the reality of the situation is that if one compares the current proposal to the permit, and the project uses pervious pavers, there is actually less impervious surface. Mr. Rothwell stated that reality did not comport with the law in this case.

Mr. Dorsey inquired if the Applicants had thought about putting the garage on the other side of the house. Mr. Stagg and Mr. Rothwell explained that such a relocation would require a side yard variance, although it might be easier to achieve than a lot coverage variance.

Mr. Stagg inquired if the Board would be more receptive to a side yard variance.

The Vice-Chairman noted that there were different criteria for the side yard variance. Although side yard variances are, in general, easier to obtain than a critical area variance he felt the first hurdle the Applicant had to overcome was not unwarranted hardship, but uniqueness. He found the uniqueness issue difficult as there are a number of two (2) acre lots in the RR district, and some are probably equally constrained. The question can be stated -- is the property so developed that the Applicants cannot construct a garage without a variance? Does that specific uniqueness exist? Is there something especially unique about the soils that would allow the additional run off and create a better situation overall?

Mr. Stagg stated that he felt the one hundred fifty foot (150') setback from the Oxford Road made the property unique.

The Chairman commented that the one hundred fifty foot (150') setback would be common to all lots on the Oxford Road, and did not necessarily make the property

unique.

Mr. Rothwell explained that he had measured the east side of the property to see what the situation would be if the garage was built on the east end of the residence. The garage would come within five feet (5') of the property line, and the Applicants would have to remove more than one tree.

Mr. Stagg noted that many of the properties in this area were built before the critical areas law went into effect and had more than fifteen percent (15%) lot coverage. Since those properties are not making an application for a permit, the issue is never reached. He explained that county wide there were many properties where the lot coverage was far less than fifteen percent (15%) so that the proposed lot coverage of sixteen point two percent (16.2%) would be ameliorated by those larger lots. If one is able to mitigate the effects, as here, with suitable soils to eliminate runoff, the entire project will have no adverse environmental effect.

Mr. Jones added that the Board had had a case where it determined that the garage was a proper subject for a variance. Ms. Ogletree interjected that there was more than one, citing a decision in the Thornton subdivision last year on a smaller one acre lot.

Mr. Sewell commented that regardless, one still runs into the requirement that the variance shall not exceed the minimum adjustment necessary to permit the structure. Mr. Rothwell explained that he had difficulty with that issue also, and felt that, at a minimum, the Applicants should remove the "bump out" area shaded in green on the attachment to the staff report, exhibit 9.

Mr. Stagg clarified that the Applicants had a permit to put the garage in the location close to that shown on the site plan drawing, with a short driveway. That configuration would require taking down the tree. If granted the variance the driveway would curve, the tree would remain and the Applicants would have to mitigate for any adverse impacts.

Mr. Shortall reminded the Applicants that setting a foundation will sometimes affect the health of a tree, and was assured that the tree expert from Bartlett Tree thought the pine could be saved.

Mr. Rothwell suggested that the Applicant might want to quantify the amount of impervious surface that could be reduced by removing the "bump out". Mr. Stagg added

that it was about seven hundred (700) sq. ft.

Mr. Fisher indicated that the primary access to the residence was through a door on the east side of the house, and he would want to retain at least a walkway in that location to access the rear of the property if they were required to remove some existing site improvements.

Mr. Sewell inquired if the Applicants wished to proceed with the variance as proposed or whether they wanted to consider removal of some of the surfaces and provide new lot coverage calculations.

The Chairman commented that the large pine may live another hundred years, but it could also lose its top in a storm and might damage the residence. If it lost its top, it was likely to die.

Ms. Fisher commented that the Applicants loved the property as they had originally viewed it and might be willing to reduce the garage slightly, but she would not be in favor of removing the shed or limiting access to the house and backyard by removing the brick pad and walkway. Those were suggestions the Applicants had not considered, and were not willing to consider. They wanted what they bought, and a little more, the garage, but acknowledged that they understood sometimes a 'little more' was not possible.

Mr. Fisher added that the Applicants were willing to pay a bit more to keep the tree, but were not willing to do anything that would detract from the value of the property. Removing existing site improvements would, he believed, adversely affect value. He felt that allowing the project as shown on the site plan was a reasonable compromise. He opined that adding a few hundred feet of impervious surface was a small price to pay to keep a beautiful tree.

Ms. Young explained it is not the tree that is the issue, it is the impervious surface. There are choices one has to make to eliminate impervious surface. There are a number of similar properties in Talbot County, and what is done here will be a precedent. There needs to be a trade-off. She felt that it was not the Board's obligation to negotiate that trade-off, but to determine if the application before it should be granted. That determination is a yes or no question. If the criteria are not met, then the Board is unable to approve the variance.



Mr. Sewell concurred. Mr. Dorsey added that he understood that if any one of the criteria was not met, the variance could not be approved. He personally had difficulty with the concept of unwarranted hardship in this case, as the property was already well developed, and the Applicants were not losing use of the property.

There being no further testimony, Mr. Shortall invited the members to discuss their concerns.

Mr. Jones stated that he has been known to suggest that when the CAC strongly opposes an application that they should attend the Board's meeting so that they could answer questions and fully articulate their concerns. This is especially the case where there are obvious trade-offs that have to be made, since all lots vary and have different characteristics. The Board has had cases in which their explanation is very helpful and educational in explaining why the Board could not do what seemed very logical and environmentally friendly. While he agreed with the Applicants that he would not wish to take out the tree, in his view the fifteen percent (15%) rule was probably the most difficult to vary. He, personally would have a much easier time varying the one hundred foot (100') shoreline development buffer for good reasons like trees than varying the fifteen percent (15%) requirement. It is a hard one, and even if the Board was to grant the variance there is no guarantee that the decision would not be appealed.

He believed the law is pretty clear on the meaning of uniqueness. If the Board is to allow a permanent change to the property by permitting additional lot coverage exceeding fifteen percent (15%) the reason for it should have equal dignity and be a permanent reason as well. A tree is not a permanent fixture.

Ms. Young commented that she had already given her reasoning, and agreed with Mr. Jones – trees are not forever. She found the variance very difficult to approve.

Mr. Dorsey complimented the Applicants on their beautiful home. He spent some time looking at the site and acknowledged that it would be very tight to get to the garage without removing the tree, and that is unfortunate. However he is required to interpret the law, and he does not believe there is an unwarranted hardship that prevents reasonable use of the property. He did not believe the Applicants had met that burden. One can still park without a garage. Not having one may be inconvenient, but it does not deny one the use of the property.

Mr. Sewell agreed with the other Board members noting that the property was improved by beautiful trees, and although it is a shame that one has to come out to have a garage, the fifteen percent (15%) lot coverage threshold requires the Board to be very conservative in granting a variance.

The Chairman agreed with all of the points made by the other Board members. He stated that he liked trees, but did not feel that the Board should vary the law for the benefit of one tree.

Based on the Applicant's written responses, the testimony and the evidence presented, with regard to the critical area variance, the Board finds that:

1. The public hearing was properly advertised<sup>1</sup> and posted, and that the adjacent land owners were properly notified. Exhibits 3, 4, 5 and 8.
2. The Applicants have received an unfavorable recommendation from the Critical Areas Commission exhibit 12.
3. The Staff Report, exhibit 7, points out that although the lot is constrained by a deep one hundred fifty foot (150') setback from the Oxford Road, fifty foot (50') side setbacks, and the one hundred foot (100') shoreline development buffer there are ways to reduce lot coverage so that the Applicants can comply with the lot coverage requirement.
4. The existing property is slightly over two acres in size. The property use is that of a residence. The front yard is occupied by the septic system, and is therefore not suitable as a construction site. Placing the proposed garage on the east side of the residence would cause a side setback violation and reduce the setback from the required fifty feet (50') to five feet (5'), and would require a variance. The Applicant has obtained permission to build an eight hundred thirty two (832) sq. ft. garage on the west side of the residence close to the existing driveway. That placement would necessitate removing a large loblolly pine tree to get access to the garage, but would not necessitate a lot coverage variance. The Applicants have filed this application pursuant to *Code*, ' 190-136 to build the garage and design its entrance so that no trees would be removed, however, the configuration chosen will necessitate a curved driveway for access,

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<sup>1</sup> The initial published notice contained a transposition of two numbers in the property address (5290 rather than 5920). The published notice was corrected prior to the second insertion, and revised notices were mailed to all interested property owners.

resulting in a total of fourteen thousand four hundred eighty eight (14,488) sq. ft. or sixteen point two percent (16.2%) lot coverage. Fifteen percent (15%) lot coverage or thirteen thousand three hundred eighty-two (13,382) sq. ft. is permitted. *See, Code, ' 190-136 A; exhibits 9 and 15, lot coverage computations.*

5. The Applicants believe that by removing certain existing site improvements (a shed and parts of a brick parking area and walkway) they would detract from the value of their home and are unwilling to remove all or a portion of those impervious surfaces to allow their proposed construction to be completed without a variance.

6. The residence was constructed in 1961 prior to the advent of the critical areas legislation and the current zoning ordinance. The property has never been improved by a garage. The Board finds that a garage is a normal and expected site improvement on a residential lot.

7. Although this property is constrained by various setback requirements, there are other Talbot County properties, some smaller in size than the subject of this application, with similar setback restrictions. The Board therefore finds that there are no unique attributes of either the land or the structure of this property that justify a variance.

8. A garage is considered a 'usual' adjunct to a residence. Requiring compliance with the critical area lot coverage requirements of the *Code* would not deprive the Applicant of the rights enjoyed by other property owners in the same district to have a garage, as the *Code* permits fifteen percent (15%) lot coverage in an LDA. *Code, ' 190-136 A*, and will allow the Board to vary that requirement in truly exceptional cases.

9. Applicants' proposed garage can be built on the site<sup>2</sup> without a variance, although the construction project will require the removal of a large loblolly pine.

10. The need for this variance is created by the action of the Applicants. Although it would be possible to remove enough impervious surface to allow the proposed garage and driveway to be built as shown on exhibit 9, without the necessity of a variance, the Applicants have chosen not to avail themselves of this means of achieving their objective.

11. There will be no adverse effect on habitat and/or water quality. Soils are

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<sup>2</sup> The Applicants candidly admitted that they have a permit for construction of a garage in hand. The current application would allow them to create a more attractive entrance for the garage and, by so doing, save the large loblolly pine they would have to remove if they built as required by the permit.

moderately to well-drained and the property is amply vegetated and able to absorb any run off. There would be room for any required mitigation on site.

12. The variance is not necessary to provide relief. The Applicants are able to construct a garage without a variance to the lot coverage requirements, or could remove enough impervious surface to construct the garage as shown in exhibit 9. They have chosen not to remove any existing impervious surface, and yet are able to construct a garage as evidenced by the construction permit they have previously obtained.

For the reasons set out in the Board's findings, Ms. Young made a motion that the requested variance be denied:

Mr. Dorsey seconded the motion. There was no further discussion on the motion. The Chairman called for a vote. The motion passed, 5-0 with all members voting to deny the variance requested.


HAVING MADE THE FOREGOING FINDINGS OF FACT AND LAW, IT IS,  
BY THE TALBOT COUNTY BOARD OF APPEALS,

RESOLVED, that the Applicants, **CLAYTON and PATRICIA FISHER.** ,  
(Appeal No. 15-1642) are **DENIED** the requested variance.

GIVEN OVER OUR HANDS, this 11th day of April, 2016.


**TALBOT COUNTY BOARD OF APPEALS**

  
Paul Shortall, Jr., Chairman

  
Phillip Jones, Vice Chairman

  
John Sewell -- Member

  
Margaret Young -- Member

  
Louis Dorsey, Jr. -- Member